Supreme Court, U.S.
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No. 00-1181

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

BRUCE L. HOWELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF ARIZONA, DIVISION ONE

BRIEF IN OPPOSITION

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THE FACTS OF THE CASE

The facts essential for a determination of the legal issue presented to this Court are somewhat different than those recited by the State in its Petition, because the State sets forth as *facts* certain unwarranted *conclusions* that it reaches from the facts. The unadorned facts, from the actual testimony in the case, are as follows.

Bruce Howell's cell adjoined the murderer's (Leroy Cropper's) cell by a party wall. High in the party wall was a three foot long ventilation duct, with metal cross slatted covers on each end. Prisoners could communicate with each other through this duct by standing on the toilets in the respective cells. On the morning of March 7, 1997, Howell heard parts of conversations that occurred between his cellmate, Eugene Long, standing on the toilet in their cell, and Cropper in the adjoining cell. Some of the conversation involved amorphous threats by Cropper against unnamed guards and inmates alike, and another vague threat that Cropper was going to "get it on." But Long and Cropper were laughing, and Howell didn't take any of it seriously. Such tough talk was common among inmates, and no guard had been murdered in any Arizona Prison for 32 years. To do so, Howell testified, would be tantamount to committing suicide. This was a medium security prison with inmates determined by the Department of Corrections to be non-dangerous, and Howell had no inkling that Cropper would actually kill a guard.

Possession of knives among prisoners was commonplace. In the inmate culture, many of them felt a need to "hold steel."[1] After lunch, Howell's cellmate, Long, came into the cell and "whipped" a knife blade out of his belt, stood on the toilet, and

1. Testimony from a prison investigator was that such knife blades come into the prison in the boot soles of inmates who work outside the prison on highway maintenance. They slit the thick soles of their work boots and slide in knife blades they find along the roadway.

displayed it through the ventilation duct to Cropper. Howell told Long that he didn't want the knife in the cell, and Long ignored him. At this point, inmate Joshua Brice came into the cell. Brice had earlier given the knife to Long. Howell opened the door to leave the cell, and as he left, a third inmate, David Phipps, came into the cell and closed the solid metal door behind him. Howell sat down on a chair outside his cell on the second floor "run". Howell testified that he did not see or realize at the time that Long, Brice, and Phipps had taped two flyswatters together, taped the knife to one end, and passed the knife to Cropper through the ventilation duct. No evidence contradicted the fact that Howell was sitting outside the closed cell during this transaction.

However Brice, who agreed to testify against Howell in exchange for not having to serve any additional time in prison, testified that when Howell left the cell, Howell said, "I'll stand point." The meaning of which, in prison parlance, was that Howell would be the lookout for any approaching guards. Howell denied saying this. "I'll stand point" was the sole evidence that the State presented in the first trial in an effort to convict Howell of the crime of "promoting prison contraband," *i.e.*, aiding and abetting supplying the knife (murder weapon) to Cropper (the murderer). Howell was acquitted of promoting prison contraband, as he was of first degree murder and conspiracy to commit dangerous assault by a prisoner. The jury hung on "aiding and abetting dangerous assault by a prisoner," and the trial court declared a mistrial.

Two months later, a second trial was held on the mistried charge, dangerous assault by a prisoner. Over the repeated objections of Howell's attorney, the trial court once again permitted the State to introduce precisely the same testimony by Brice, that Howell had left the cell and said, "I'll stand point."

REASONS FOR DENYING THE WRIT

The Court of Appeals of the State of Arizona held that the introduction of this *fact* in the second trial, which had conclusively been determined against the State in the first trial, violated the 5th Amendment's prohibition against double jeopardy by collateral estoppel, as articulated in *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 256 L. Ed. 2d 469 (1970).

This is not an arcane event in the history of American jurisprudence. Nor did it appear so to a unanimous Court of Appeals and Supreme Court (on Petition for Review). But to the State, the Court of Appeals decision reversing the conviction and remanding, and the refusal of Arizona's High Court to review it, are spine jolting aftershocks of an earthquake of injustice.

In support of this position, the State asserts that there is disagreement among the federal circuits on the issue of the application of the collateral estoppel rule laid down in *Ashe v. Swenson, op. cit.* The State's evidence for this is a number of cases which are proffered to demonstrate this "disagreement".

The first is *Nesbitt v. Hopkins*, 86 F.3d 118 (8th Cir. 1996). One rushes to Westlaw, find's *Nesbitt*, prints it out with alacrity, and reads it with a pounding heart.

But *Nesbitt* has not an iota of relationship to the issue at hand, and in contrast to the State's assertions about it, it not only completely concurs in the collateral estoppel holding of *Ashe* but further tells us pointedly and succinctly why *Ashe* doesn't apply to *Nesbitt*. Nesbitt was tried in one trial on one count of felony murder and one count of first degree murder. The finder of fact acquitted him of felony murder (there being no substantial evidence of the underlying felony of sexual assault), but it convicted him of first degree murder.

Nesbitt claimed on appeal that the acquittal of felony murder somehow collaterally estopped his murder conviction. The Eighth Circuit rejected this out of hand:

> To be sure, the trial court's dismissal of Nesbitt's felony murder charge was an acquittal for double jeopardy purposes. . . . But his conviction of premeditated murder did not place Nesbitt twice in jeopardy because the "criminal rule of estoppel found in Ashe v. Swenson . . . does not apply to verdicts of guilt and innocence rendered in a single trial." Arnold v. Wyrick, 646 F.2d 1225, 1228 (8th Cir. 1981). Se also Ohio v. Johnson, 467 U.S. 493, 500 n. 9 . . . ("where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable"). As the district court correctly observed, "At worst, Nesbitt was tried once on alternative theories of murder. American law has long permitted the assertion of alternative theories of first-degree murder in one murder prosecution without concern that the defendant is subject to double jeopardy if convicted on one theory but acquitted on the other."

Id. at 121.

In further support of its claim of inconsistent application of *Ashe*, the State cites *United States v. Farmer*, 923 F.2d 1557 (11th Cir. 1991). But *Farmer* stands for nothing inconsistent with *Ashe*, and in fact it simply reasserts what is black letter law: *conspiracy* to commit a crime is a separate crime from the *substantive crime*, and acquittal of one does not bar conviction of the other.

The instant case of Bruce Howell is precisely on all fours with this principal of law. Howell was tried in the first trial for,

inter alia, conspiracy by a prisoner to commit dangerous or deadly assault, and the *substantive crime* of dangerous or deadly assault by a prisoner. He was acquitted of the conspiracy, but the jury hung on the substantive crime. The second trial was on the substantive crime, and Howell never sought to have the trial stopped or to prevent it by a claim of double jeopardy or any other claim. Howell was convicted of the substantive crime. However, in the first trial, the jury had acquitted Howell of the separate crime of supplying the murder weapon to the murderer. Notwithstanding this, the trial court permitted the prosecution in the second trial to introduce precisely that fact, of which Howell had been acquitted, in an effort to prove that Howell *did* supply the murder weapon to the murderer.

The decision of the Arizona Court of Appeals was quite simply that in Howell's retrial (third trial), now scheduled to begin on July 16, 2001, the State should not be able to introduce this same fact that has already conclusively been determined against the State.

If *Ashe v. Swenson, op. cit.*, stands for anything, it has to stand for the principal that such relitigation of an already conclusively determined fact violates the double jeopardy's collateral estoppel prohibition. This is all that the instant case is about, despite the State's desire to torture it through pure legerdemain into something more exotic, and to aggrandize the inapplicable cases it cites into a "split of opinion" in the federal courts. There is no split of opinion. The State simply yearns to bring before the United States Supreme Court an issue that has uniformly been decided against the State's position for 30 years.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny the State's petition for a writ of certiorari.

Respectfully submitted,

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